

DATE: FEBRUARY 23, 1996

CASE NO: 94-INA-541

In the matter of

DANIEL COSTIUC
Employer

on behalf of

EUGENIA RADU
Alien

Before: Jarvis, Vittone and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Daniel Costiuc's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 20, 1992, Employer filed a Form ETA 750, Application for Alien Employment Certification, with the New York Department of Labor ("NYDOL") on behalf of the Alien, Eugenia Radu. AF 13. The job opportunity was listed as Live-in Domestic. Id. NYDOL referred the resumes of six applicants to Employer. AF 20-22. On December 7, 1992, Employer submitted a Response to Recruitment which indicated that none of the applicants were hired for the job. AF 38-40, 47. NYDOL referred the file to the CO. AF 55.

On February 25, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. AF 58. The CO questioned the rejection of applicants Victoria Jibodu and Donatienne Joseph. AF 56-57.

The CO found that Jibodu appeared qualified for the position. Employer rejected her because he could not locate her telephone number through directory assistance and because a telephone call placed to her reference resulted in not being able to contact the reference. The CO questioned why Employer did not contact Jibodu through postal channels and asked her to explain the inability to contact the reference. The CO also questioned whether Employer made a good faith recruitment effort. AF 56-57. The CO also found that Joseph appeared qualified for the position. Employer stated that Joseph was rejected because she stated that a live-in position would conflict with her schedule. Joseph, in response to a follow-up survey by NYDOL stated she was not contacted about the job. AF 32. The NOF directed Employer to file rebuttal with respect to the issues raised concerning Jibodu and Joseph and provide documentation that the two applicants were not qualified, willing or available at the time of initial consideration. AF 56.

Employer filed a timely rebuttal. AF 59-61. As the CO accepted the rebuttal with respect to applicant Joseph, her rejection need not be further discussed. AF 63. As to applicant Jibodu, Employer stated:

Given the inaccuracy of Ms. Jibodu's statements, be they intentional or accidental, Ms. Jibodu is deemed to be untrustworthy. I cannot and will not entrust my children to someone whose background I cannot ascertain or who cannot be depended on to keep accurate records of such vital information. It is hard to believe that your office would require me to consider such a person for employment in my

own home. After this above recital there is nothing Ms. Jibodu could say to me to explain away such blatant misinformation that would allow me to entrust my children to her care. How could I believe anything she would say to me after this experience. AF 59-60.

On April 6, 1994, the CO issued a Final Determination ("FD") which denied the application. AF 64. The CO found that if there had been a good faith recruitment effort, a reasonable employer would have attempted to contact Jibodu to determine the reason Employer was not able to contact the reference before concluding that Jibodu was untrustworthy. AF 62. The CO also found that Employer failed to provide objective, lawful, job-related reasons for rejecting Jibodu. Id. Employer filed a timely request for review. AF 75.

Discussion

The Board has held that the requirement of a good faith effort to recruit qualified U.S. workers is implicit in the regulations found at Title 20 of the Code of Federal Regulations, Part 656. H.C. LaMarch Ente., Inc., 87-INA-607 (October 27, 1988). In the case at bench it appears that Jibodu was qualified for the job. AF 57. When Employer was unable to contact the reference given by Jibodu, he had the obligation to contact the applicant to find out why the telephone number was incorrect. Relief Printing Corporation, 89-INA-346 (Jan. 23, 1991). If Employer was unable to find a telephone listing for Jibodu (AF 38) he had the duty to contact her by mail. Vanessa I. Park, 93-INA-323 (Jan. 25, 1995); Gertrude Giboff, 93-INA-462 (June 13, 1994); Jerry's Bagles, 93-INA-461 (June 13, 1994).

As the CO pointed out in the FD, the fact that Employer did not reach the reference at the number furnished by Jibodu could have been due to many reasons including a transposition of numerals or that the former employer may have moved and the telephone number was assigned to another person. AF 62. The Employer's conclusion that the inaccuracy of the references' telephone number, whether intentional or accidental, made Jibodu untrustworthy is unwarranted and ludicrous. As indicated, Employer was required to contact Jibodu for an explanation. He did not do so. The CO properly denied certification on the grounds of lack of good faith recruiting and the rejection of Jibodu for a reason which was not lawful and job-related. Nationwide Baby Shops, Inc., 90-INA-286 (October 31, 1991).

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ORDER

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

DBJ/bg